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No. 18482

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LUIS LEIVA CERVANTES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On November 21, 1962, appellant Luis Cervantes was indicted by a Federal Grand Jury for the Southern District of California. He was charged in nine counts with violation of Section 174, Title 21, United States Code (District Court Case No. 31642-(WM)-CD). Counts One, Three, Five and Seven charged that appellant knowingly and unlawfully sold specified quantities of heroin to a Special Employee of the Federal Bureau of Narcotics on September 27, October 4, October 16, and November 1, 1962, respectively, which, as he then and there well knew, had been imported into the United States of America contrary to law. Counts Two, Four, Six, Eight and Nine charged appellant with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of specified quantities

of heroin on the same dates, Counts Eight and Nine relating to the November 1, 1962, transaction. [C. T. 2-10.][1]

Appellant was represented by counsel throughout the proceedings. A plea of not guilty was entered as to all counts, and, after jury waiver, trial by court was commenced on November 26, 1962. Appellant was found guilty as charged on Counts One through Eight on November 29, 1964. Count Nine had been dismissed previously on that date on motion of the Government. [C. T. 11.]

The Government thereafter filed an Information charging previous convictions and on November 29, 1964, appellant was sentenced to 20 years' imprisonment on each of Counts One through Eight, the sentences to commence and run concurrently. [C. T. 11 and 12.]

Appellant's motion for judgment of acquittal or, in the alternative, for a new trial was denied, the motion and order being filed December 12, 1962. [C. T. 13.] Notice of appeal was timely filed December 21, 1962. [C. T. 17.] The order of the United States District Court permitting appeal *in forma pauperis* was filed December 14, 1962. [C. T. 18.]

The jurisdiction of the District Court was based on Title 18, United States Code, Sections 174 and 3231. Jurisdiction of the Court of Appeals is conferred by Title 28, United States Code, Sections 1291 and 1294.

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[1]"C. T." refers to Clerk's Transcript of Record on Appeal.

II.
SPECIFICATIONS OF ERROR.

Appellant has failed to make specifications of error as required by the rules of this court. He makes certain contentions at page 3 of his Opening Brief claiming a variance between allegations in the indictment and the proof adduced during the trial. At page 4 of his brief appellant claims that statements made by him at and after the time of his arrest were unlawfully procured in view of the interrogating officers' failure to advise him of his right to counsel. He further contends that this evidence should not properly have been considered by the court. At the close of his argument, at page 8, appellant advances the position, apparently, that there was insufficient evidence upon which to base convictions on Counts 2, 4, 6, and 8 (receiving, concealing, and facilitating the concealment and transportation of heroin).

III.
RULES INVOLVED.

Rule 51, Federal Rules of Criminal Procedure, Title 18, United States Code, provides as follows:

> "Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

Rule 52, Federal Rules of Criminal Procedure, Title 18, United States Code, provides as follows:

> "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> "(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

IV.

STATEMENT OF FACTS.

During the latter part of September, 1962, three officers from the Lennox Sheriff's Station contacted Mrs. Wanda Krug at her apartment. A conversation ensued during which these officers informed Mrs. Krug that they wanted her to cooperate with them in an investigation of the narcotics activities of appellant. She agreed and it was arranged that she would appear at the Sheriff's Station the following day. Mrs. Krug met with these officers the next day as planned, at which time she agreed to make a purchase of heroin from the appellant. [R. T. 67-70.][2]

This was the initiation of a series of four transactions, arranged by Wanda Krug at the request of the Sheriff's Department, by which she purchased quantities of heroin from the appellant. At the trial, Mrs. Krug gave a detailed account of her activities. [*Cf.* R. T. 70-110.] Due to the fairly routine character of

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[2]"R. T." refers to Reporter's Transcript.

her participation in the first three transactions and the events leading up to appellant's arrest on November 1, 1962, her testimony is summarized below.

Prior to each of the first three transactions Wanda Krug telephoned appellant to arrange a meeting with him at his home. She was then thoroughly searched by Sheriff's officers and given county funds with which to make purchases of heroin from appellant. She then immediately proceeded to appellant's home and obtained heroin from him in exchange for the county funds. The heroin was subsequently transferred to Sheriff's deputies who took her to the Sheriff's Station where she was thoroughly searched. A detailed statement relating her participation was prepared immediately thereafter.

Mrs. Krug's testimony was amply corroborated by several Sheriff's Deputies who testified as to the following aspects of Mrs. Krug's participation in each of the four transactions. [*Cf.* R. T. 123-197.] Each transaction was discussed in advance with Mrs. Krug. She and her car were thoroughly searched prior to her proceeding to appellant's house. Surveillance was maintained over her prior to, and after her meeting with appellant. The heroin was received from Mrs. Krug immediately after her departure from appellant's house. She was again searched after being returned to the Sheriff's Station, and a statement recounting her activities was then prepared and signed by Mrs. Krug.

The events of the evening of November 1, 2962 — the night of the fourth transaction and appellant's arrest — are set out in detail below.

On the evening of November 1, 1962, Wanda Krug was provided $145.00 in county funds by Leo Berman, Deputy Sheriff. [R. T. 92, 133, 169, 182.] This money had been dusted with a fluorescent powder by Sheriff's Deputy Scholten. [R. T. 169 and 186.] Mrs. Krug had previously called appellant to arrange a meeting for that night. [R. T. 92.] After she and her car had been thoroughly searched by Sheriff's officers [R. T. 93, 132 and 163], a radio transmitter was attached to her person by Sheriff's Deputy Queen [R. T. 93, 132], and she proceeded to appellant's residence. [R. T. 94.]

Meanwhile, Sheriff's Deputies Scholten and Cox had proceeded to a location in the immediate vicinity of appellant's residence in a panel truck and were maintaining a vigil on a radio receiving device in conjunction with the transmitter attached to Mrs. Krug's person. [R. T. 182.] After Mrs. Krug was observed by Officer Scholten to enter appellant's house (about 7:00 P.M.), a conversation between Mrs. Krug and a male voice was heard intermittently over the receiver. [R. T. 183.] Officer Scholten related the conversation and subsequent events as follows [R. T. 183-186]:

> "A. The conversation was between Mrs. Krug and a male voice. The first part of this conversation had to do with the health of Mrs. Krug. Then the male voice questioned Mrs. Krug as to whether she had seen anything suspicious out in front of the house, and in particular mentioned an old truck parked across the street. The conversation went on. I overheard Mrs. Krug to say, 'I want two.'

The male voice replied, 'Two papers?'

She said, 'No, two quarters. I have $75 for one and $70 for the other.'

The male voice then said, 'Well, one will be short,' and indicated that she would have to wait a few minutes. . . ."

* * *

"Q. What happened then? A. I heard the same male voice which I had previously heard in conversation with Mrs. Krug state, 'This has only got five in it,' or something similar to that; and the conversation continued. The male voice said, 'It's tamped down in there, but it's all there,' or something on that order.

Then the male voice said, 'Here. Take this. You need it for the rent,' or something of that nature.

There was again the sound, the same as someone moving, and I next observed Mrs. Krug and the defendant Mr. Cervantes walking down the driveway on the east side of the residence at that location engaged in conversation.

Q. Mr. Scholten, later on that same evening did you have reason to go back to the defendant's house? A. I did.

Q. Did you have any type of equipment with you at that time? A. Yes, I did.

Q. What type of equipment did you have? A. That was a portable ultra-violate lamp.

Q. What did you do with this lamp, sir? A. I shone the lamp on the hands and clothing of all of the persons, except the police personnel, that were inside the house at that time.

Q. And what was the result? A. The defendant Mr. Cervantes' hands, and on his pants, next to his pocket, were the only ones that fluoresced in the particular shades of green and yellow fluorescence that I had used on the money.

Q. Did you hear Mr. Cervantes say anything at this time? A. Yes. I don't recall what it was, but I remember him saying something.

Mr. Roschko: No further question."

Appellant was placed under arrest by Officer Berman about 7:30 P.M., on November 1, 1962. At that time Officer Berman told appellant that he was under arrest for State and Federal Narcotic Laws and that anything he would say could be used against him. Approximately 20 minutes later, appellant was again told by Officer Berman that anything he said could be used against him, and appellant was shown two balloons containing a substance which Wanda Krug had delivered to Berman after leaving appellant's house. Appellant was asked what he did with the money Wanda had given to him, and he replied that he gave it to a negro named Leo shortly after Wanda left [R. T. 133, 176]; that he had obtained the two balloons he sold to Wanda from Leo, and that he had been buying heroin from Leo in quarter ounce quantities for approximately five months for his own use. [R. T. 194.] These remarks were reiterated by appellant to Officers Scholten, Austin, Cox, Berman, and Zane at the Lennox Sheriff's Station later that same evening. [R. T. 165-171; 178-180; 194, 195.]

V.

ARGUMENT.

A. Appellant Has Waived the Contentions Made on Appeal by His Failure to Make Timely Objections and Motions at Trial.

Prefatorily it is noted that appellant has failed to comply with Rule 18, Subdivision 2.(d) and (e) of the Rules of the United States Court of Appeals for the Ninth Circuit[3] in that he has not separately and particularly set out each error intended to be urged. Moreover, although appellant alleges error as to the admission of evidence of his statements to interrogating officers, he has not specifically quoted the grounds urged at the trial for the objection and the full substance of the evidence admitted, as required by the above mentioned rule. Furthermore, appellant's argument does not exhibit

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[3]Rule 18, Rules of the United States Court of Appeals for the Ninth Circuit, provides in pertinent part as follows:

> "2.(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis,* whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. . . .
>
> "2.(e) A concise argument of the case (preferably preceded by a summary), exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the pages of record and the authorities relied upon in support of each point. . . ."

a clear statement of the points of law or facts to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point, as required by Rule 18, Subdivision 2.(e), *supra.*

It would have been sufficient, in conformity with Rule 51, *supra,* if appellant, at the time of trial, had made known to the court the action he desired to be taken or his objection to the action of the court and the grounds therefore.

However, in this case, no motion for a Bill of Particulars was made in advance of the trial. No motion to dismiss was made in the grounds of the alleged material variance between the allegations of the indictment and the proof introduced at trial. No objection was made to the testimony of arresting officers as to the statements made by the appellant at the time of his arrest. No motion to strike such testimony was made, and no motion for mistrial was made on the ground that such evidence was illegal and prejudicial.

Accordingly, it is submitted that appellant has waived the questions now propounded, and may not raise them for the first time on appeal.

> *Hill v. United States,* 261 F. 2d 483, 489 (9 Cir. 1958);
>
> *Fiano v. United States,* 271 F. 2d 883, 885, (9 Cir. 1959); cert. den. 361 U. S. 964 (1960); rehrg. den. 362 U. S. 925 (1960).

Although this court has discretion to review the record to determine whether or not any plain error or defect exists which affects the substantial rights of the appellant (Rule 52(b), Federal Rules of Criminal Procedure), it is submitted that the following argument shows that the record discloses no such plain error.

B. The Evidence Was Sufficient to Support Convictions as to the Concealment Counts.

At the outset it should be pointed out that appellant received concurrent sentences on all counts upon which he was convicted. Therefore, if it appears that the conviction is correct on any count, it is not necessary to review the judgments on the other counts. *Ybarra v. United States,* 330 F. 2d 44 (9 Cir. 1964), citing *Sinclair v. United States,* 279 U. S. 263 (1929).

In his attack upon the convictions as to the concealment counts (Counts 2, 4, 6, and 8) (Brief, pp. 7-8), appellant traces the alleged defect in the judgment to a variance between the allegations of the indictment and the proof introduced at trial. That variance related to the designation of the purchaser specified in Counts 1, 3, 5, and 7, charging sales of heroin. The indictment did not refer to any person other than the appellant in the concealment counts. It was only necessary to a finding of guilt as to such counts, that the appellant's possession of the heroin be established. The particular identity or status of the witness percipient to the fact of possession is wholly irrelevant to that issue.

Therefore, since the trial judge believed the overwhelming evidence establishing appellant's possession of heroin at the times alleged in the indictment, such possession was sufficient to authorize conviction, the appellant not having explained his possession to the satisfaction of the court. (*Cf.* Title 21, United States Code, Section 174; *Yee Hem v. United States,* 268 U.S. 178 (1925); *Agobian v. United States,* 323 F. 2d 693 (9 Cir. 1963), cert. den. 375 U.S. 985.)

The conviction must stand if supported by substantial evidence (*Buford v. United States,* 272 F. 2d 483 (9 Cir. 1960)), and on appeal, when considering an attack on the sufficiency of the evidence, the appellate court views the evidence at trial in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom. *Glasser v. United States,* 415 U.S. 60 (1942); *Robinson v. United States,* 262 F. 2d 645 (9 Cir. 1959); *Stein v. United States,* 337 F. 2d 14 (9 Cir. 1964).

The evidence was clearly sufficient to support the convictions as to the concealment counts, independently of any incriminating admissions made by appellant with respect to the last transaction (Counts 7 and 8). It is submitted that the convictions as to Counts 2, 4, 6, and 8 are correct and should be affirmed, regardless of any question of error relating to the convictions on the remaining counts.

C. Appellant Has Pointed to No Error Resulting From the Admission in Evidence of Statements Made by Him to Arresting Officers.

Appellant contends that since he was not advised of his right to counsel by the arresting officers, his statements were illegally elicited in violation of the Sixth Amendment, and the conviction should be reversed. No authority has been offered to explain or support this claim, and the case does not present the class of factual situation contemplated by the United States Supreme Court in the cases of *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois,* 378 U.S. 478 (1964).

The appellant had been informed by arresting officers that anything he said could be used against him. This warning was made at the time of arrest prior to the appellant's making any statements and again prior to questioning in appellant's backyard. There is no evidence of physical or psychological coercion, and the record discloses that the statements were made by appellant voluntarily.

Appellant had never requested counsel. He had never been denied access to counsel, and he was fully represented at trial after his plea of not guilty. There was no intervention between appellant and his counsel as in the cases of *Escobedo* and *Massiah, supra.* (See also *Queen v. United States,* 335 F. 2d 297, 298 (D.C. Cir. 1964)). Moreover, there was no denial of counsel at any critical stage where such deprivation resulted in the making of statements which later impelled the entry of a guilty plea, as in the case of *Wright v. Dickson,* 336 F. 2d 878 (9 Cir. 1964).

The trial court evidenced an acute awareness of the necessity for a showing that appellant had been advised of his right to remain silent as a prerequisite to the admissibility of any statement made by him. [R. T. 166-168.]

Although appellant urges that this evidence should not properly have been considered by the court, it is presumed on appeal that the trial court considered only competent evidence. *Alexander v. United States,* 241 F. 2d 351 (8 Cir. 1957). The court's rulings in admitting evidence cannot be urged as prejudicial if there is competent evidence to sustain the judgment. *Anderson v. Federal Cartridge Corporation,* 156 F. 2d 681 (8 Cir. 1946).

The testimony of Wanda Krug alone was adequate to support the conviction. In addition, her testimony was fully corroborated. No showing has been made that the introduction of appellant's statements in the Government's case in chief was prejudicial. Furthermore, there is no indication that appellant's defense was hampered, or in any way adversely affected by the admission of his statements to interrogating officers.

Finally, it is important to note that appellant's statements to the Sheriff's deputies were material only to the November 1st transaction (Counts 7 and 8). Nothing in appellant's admissions can be construed to implicate him in the offenses charged in the preceding six counts of the indictment. Therefore, the illegality, if any, which appellant claims attached to this evidence, is wholly unrelated to the validity of the convictions as to the preceding six counts.

D. The Alleged Variance Between the Allegations of the Indictment and the Proof Adduced at Trial Was Not Material and Did Not Affect the Substantial Rights of Appellant.

The appellant does not now, nor did he originally attack the sufficiency of the indictment.

The classical rule with respect to the sufficiency of an indictment is set forth in the case of *United States v. Dubrow,* 346 U.S. 374, 376 (1953) which states:

> " 'The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other pro-

> ceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.". . .' . . ."

In the case of *Rivera v. United States,* 318 F. 2d 606 (9 Cir. 1963), appellant contended that the indictment did not meet Sixth Amendment standards because it failed to allege the name of the person to whom he sold marijuana. The court held that that detail was not an element of the offense stated under 21 U.S.C.A. Section 176a. The court said at page 607 that:

> "The indictment alleged the offense substantially in the words of the statute, which sets forth all the essential elements of the crime; in addition, the time and place of sale were specified, as was the amount of marijuana sold. The indictment thus alleged an offense, and identified the particular conduct upon which the charge was based to the extent necessary to protect appellant from double jeopardy and to tell him what he must be prepared to meet. This was enough to satisfy constitutional standards; an indictment in the form of this one would not be vulnerable to attack even on direct appeal from judgment of conviction. (Citing *Debrow, supra,* and other cases.)"

See also *Robison v. United States,* 329 F. 2d 156 (9 Cir. 1964) applying *Rivera, supra,* to 21 U.S.C. 174; and *Taylor v. United States,* 224 F. Supp. 82 (W. D.) Mo. 1963.

If the evidence introduced by the government conforms in all material respects to a sufficient indictment, the appellant cannot complain that he has been

misled or exposed to subsequent prosecution. *Berger v. United States,* 295 U.S. 78, 82 (1935).

It is submitted that the designation of the status of the individual to whom appellant was charged with selling narcotics was an insignificant factor in the preparation of his defense. If it were necessary for appellant to determine the identity of the purchaser, it would have been appropriate for him to move for the filing of a Bill of Particulars. No such motion was made. The fact that Wanda Krug was associated with local law enforcement officers, and not the Federal Government, as specified in the indictment, could not materially have affected appellant's tactical position at trial, unless he discovered that he had sold a like quantity of heroin the same day to a special employee of the Federal Government. Appellant's argument negatives this possibility. (See Appellant's Brief, p. 5.)

Appellant relies solely on *United States v. Raysor,* 294 F. 2d 563 (3 Cir. 1961). In that case, appellants were charged with selling narcotics to George Dilworth, a Narcotics Agent, while the evidence at trial established sales to one Thomas Charity. Charity was a decoy, buying for Dilworth with money provided by Dilworth. The government contended that the sale to an agent was equivalent to a sale to the principal, and argued that the variance was therefore not material. It was held that the appellants would not be protected from another prosecution for the sale of heroin to Charity should the conviction for making a sale to Dilworth be permitted to stand.

It is submitted that the *Raysor* decision is incorrect, but that conclusion is not necessary to the rejection

of *Raysor* as an applicable authority, since it is obviously distinguishable on its facts. In that case, the indictment personally identified the individual to whom Raysor allegedly sold narcotics. No such personal identification exists in the indictment in the present case, and appellant found himself confronted with the same situation as that created by an indictment which does not specify the identity of the other party to the transaction.

In *Ferrari v. United States,* 169 F. 2d 353 (9 Cir. 1948) the indictment charged appellant with having received heroin from one Bruno. The proof established one Flier to have been the person with whom appellant associated in the illegal use of heroin.

The court held that appellant was informed of the nature of the charge and so was enabled to present his defense, was not taken by surprise, and is protected against another prosecution for the same offense.

The government's evidence showed that appellant was in the back room of a certain bar in San Francisco with Flier. Defendant's evidence was that he was in Palm Springs at that time. Furthermore, both Bruno and Flier testified for appellant.

At page 354 the court stated the following:

> "Appellant testified that he was in Palm Springs on the evening of the 5th of January, 1946, and therefore could not have been present in the rear liquor rooms of the Stardust Bar in San Francisco, California, as the testimony of witnesses for the government indicated. It was not prejudicial to the presentation of such a defense that the man alleged to have accompanied appellant to the room

> in the rear of the Stardust Bar on the said date was incorrectly named in the indictment. *The important allegations were those relating to time, place and acts.* . . . In the light of this situation it is difficult to understand in what manner appellant could have been in a better position to present all the defenses he may have had merely by the substitution of Flier for Bruno in the indictment. Count One of the indictment was not a conspiracy count. The conspiracy charge contained in Count Fifty-six was dismissed, and no charge of a sale between appellant and another person was made. Hence, the facts presented in support of the charge in Count One were of such a nature as to make it apparent appellant could not be prosecuted again for the same offense. *An examination of the entire record convinces us that the technical error complained of did not affect the substantial rights of appellant and, hence, should be disregarded.* Federal Rules of Criminal Procedure Rule 52(a), 18 U.S.C.A. following section 687." (Emphasis added.)

The view taken by this Circuit in the *Ferrari* case, *supra,* is dispositive of appellant's argument. Appellant could not be exposed to the danger of a second prosecution under the same statute for his participation in the transactions proven in the trial. Regardless of the designation applied to Wanda Krug in a subsequent indictment, presumably the same facts would be introduced at a subsequent trial, and appellant would obviously be placed in jeopardy a second time. He is expressly protected from this eventuality by the Constitution, and the charges would be dismissed.

VI.
CONCLUSION.

It is respectfully submitted that appellant has specified no defect or error at the trial which warrants reversal of the conviction. The alleged variance with respect to counts 1, 3, 5, and 7 was not material and did not prejudice appellant. The argument that appellant was deprived of his right to counsel is lacking in merit in view of the factual circumstances surrounding his admissions to interrogating officers. In any event, the argument that appellant was deprived of counsel relates to counts 7 and 8 only, and has no applicability to the remaining counts of the indictment. The evidence presented at trial was independently sufficient to support the convictions as to counts 2, 4, 6, and 8, and since the sentences imposed were ordered to run concurrently, it is not necessary to review the correctness of the judgments as to the other counts.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

WARREN P. REESE